doctrine is both inaccurate and incomplete. *Wiley* stands for the proposition that matters of substantive arbitrability (*i.e.*, is there an agreement to arbitrate this kind of dispute between these parties?) are for the courts, whereas matters of procedural arbitrability "grow[ing] out of the dispute and bear[ing] on its final disposition should be left to the Arbitrator." (at p. 543).

We have no quarrel with Petitioner's contention that the court is the proper forum for determining whether the obligation to arbitrate is "with the party seeking arbitration." It is apparently Petitioner's position that even were the issues it raises considered "procedural" if raised against the Union, that they must be considered "substantive" issues since Bealmer and Brown, who are not parties signatory to the collective bargaining agreement, seek arbitration herein.

A reading of Article XIV of the collective bargaining agreement (attached Appendix "A") confirms that by the terms of the collective bargaining agreement, individual employees have every right given directly to their Union under the grievance-arbitration procedures of the agreement. In view of this co-equal treatment of employees with their Union (giving the employee the option to designate whether he wishes to proceed through the Union or individually), Petitioner's contention that it raises issues of substantive arbitrability because Respondents here are individuals and not the Union, has no merit.

Putting it positively, the dispute is plainly arbitrable between Texaco on the one hand and Bealmer and Brown on the other *because the collective bargaining agreement so provides*. Thus, *Black-Clawson Co. v. Int'l. Assn. of Machinists*, 313 F. 2d 179 at 185 (2d.

Cir., 1962) is wholly distinguishable in its determination that Section 9(a) of the Labor Management Relations Act does not confer "an individual right upon the individual employee to compel compliance with the grievance procedure up to and including any arbitration provision." Here we cite the collective bargaining agreement itself, not the Labor Management Relations Act as authority for the right of the individual to compel arbitration. Here a finding that the issues raised are for the court and not for the abitrator would require the same finding in a Union action to compel arbitration, since Union and individual employees are given identical rights under Article XIV of the agreement at the option of the employee.

Thus, the Circuit Court correctly notes that "the District court did not hold for Texaco on the ground that the Article XII dispute was not an arbitrable issue under the collective bargaining agreement. Each of the reasons the court relied upon went to matters of procedure. Since the parties were obligated to submit this dispute to arbitration, it is the arbitrator, and not the court, who is to decide questions of procedure." (Appendix "A" to Petition, page 3a.).

Thus, the District Court in concluding that Bealmer and Brown had "no standing to order Respondent [Petitioner here] to proceed to arbitration with respect to their back pay claims," was not holding that their claims were not arbitrable from a substantive standpoint *at their individual instance*, but was holding that procedurally as a result of acts or circumstances Bealmer and Brown had lost (or had failed to initially gain) standing to compel arbitration.

The question of substantive arbitrability is ordinarily a simple one, for an Employer "cannot be compelled to arbitrate if an arbitration clause does not bind it at all," in an obligation to petitioner. *John Wiley & Sons, Inc. v. Livingston, supra,* at page 544. Once the single hurdle of substantive arbitrability has been cleared, all remaining questions, *i.e.* matters of procedural arbitrability, "grow out of the dispute and bear on its final disposition [and] should be left to the Arbitrator." (*John Wiley & Sons, Inc. v. Livingston, supra,* at page 543.)

Texaco's concern over the effect of the Circuit decision on uniform national labor policy (Petition, page 7) is without foundation, since this concern rests squarely on two false assumptions, (1) that the right of Bealmer and Brown to have the dispute arbitrated can come only from the Labor Management Relations Act, wherein it rests directly upon the collective bargaining agreement, and (2) that Bealmer and Brown seek to undo a Texaco-Union negotiated settlement of their disputes, whereas the fact of the matter is that their election to proceed individually preceded said settlement by many months. In any event, the question of claim settlement, as well as the question of time-bar, are plainly procedural in nature and for the arbitrator, since each relates to the collective bargaining agreement, each is intertwined with the merits, and each arises only after the threshold issue of substantive "arbitrability" has been decided favorably to Respondents.

Rochester Telephone Corp. v. Communication Workers, 340 F. 2d 237 (2d Cir., 1965);

Local 824, Carpenters v. Brunswick Corp., 342 F. 2d 792 (6th Cir., 1965);

Palestine Telephone Co. v. Local 1506, Electrical Workers, I.B.E.W., 379 F. 2d 234 (5th Cir., 1967).

Even issues as to when the grievance arises are procedural and to be decided by the arbitrator alone. *Sterling Provision Corp. v. Butchers Union, Local 174* (N.Y. S. Ct., 1969) 71 LRRM 2046, as are issues of accord and satisfaction. *Galveston Maritime Assn. v. Longshoremen*, 234 F. Supp. 250 (1964).

Conclusion.

The petition for certiorari should be denied.

DATED: September 25, 1970.

Respectfully submitted,

JEROME SMITH, ESQ.,
Attorney for Edward L. Bealmer and Pat Brown, Respondents.

Of Counsel:
ARNOLD, SMITH & SCHWARTZ,

APPENDIX "A."

Article XIV.

SETTLEMENT OF GRIEVANCES

Any employee, or group of employes, may individually or through their representatives present grievances to Management.

If an employe believes himself to have been injured or treated unfairly by the Company by reason of the application of any of the provisions of this Agreement, he may seek redress as follows:

FIRST

He may take a complaint to the Superintendent. Such complaint shall be submitted within fifteen (15) calendar days of the occurrence of the cause therefor.

SECOND

If satisfaction is not obtained in that manner within forty-eight (48) hours after such complaint is made, he or his representative may, within seven (7) calendar days, refer the matter in writing to the District Sales Manager, who shall, within seven (7) calendar days after complaint has been received by him, render a decision in writing.

THIRD

If still dissatisfied with the results obtained, he or his representative may, within ten (10) calendar days after receipt of the decision of the District Sales Manager, appeal in writing to the Division Sales Manager, who shall, within ten (10) calendar days, render a decision in writing; provided, however, that this requirement shall apply only in the

event the complaining party, or his representatives, has also submitted in writing full and complete information and facts to the best of their knowledge respecting the basis for the complaint.

FOURTH

If still dissatisfied, he or his representative may, within fourteen (14) calendar days thereafter, notify the Division Sales Manager in writing of his desire to submit the matter to a Board of Review. Such notice shall set forth the particular provision or provisions of the Agreement that allegedly has been violated, it being understood that the jurisdiction of the Board of Review is expressly limited to the application of the Articles of this Agreement.

Within ten (10) calendar days of receipt of such notice by the Division Sales Manager, the complainant or his representative and the Division Sales Manager shall select the Board of Review, consisting of three men; one to be selected by the complainant or his representative, one to be selected by the Division Sales Manager and one by the two so selected. The two parties so selected shall jointly request the Director of the Federal Mediation and Conciliation Service to submit the names of five persons, one of whom will be selected as the third member of the Board of Review.

Within seven (7) days after receipt of the list of names submitted by the Director of the Federal Mediation and Conciliation Service, the complainant or his representative and the Company representative shall meet and each shall eliminate the name of two of the persons listed. the complainant or his representative having the first choice of rejection, and the remaining

person shall thereupon be selected as the third member of the Board of Review, and the two representatives shall jointly notify him of his selection.

The majority decision of such Board of Review so selected shall be final and binding upon both parties. The procedure to be followed by the Board of Review shall be its sole determination. In all cases of grievances presented to a Board of Review under this Article, the Company and the complainant or his representative will furnish to the other and the Board of Review all information in their possession necessary to a full understanding of the subject matter of the grievance.

Expenses incident to the Board of Review procedure shall be borne equally as follows:

(a) One-half by the Company; and (b) one-half by the complainant if acting on his own behalf, or by General Truck Drivers, Chauffeurs and Helpers Union —Local No. 692, if acting as his representative, except that each party shall pay the expense of its own representative. (R. 24-26).